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Book Review. A Summary-Digest of State Water Laws (R. Dewsnup and D. Jensen, eds.)

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BOOK REVIEW

A Summary-Digest of State Water Laws. NATIONAL WATER COMMISSION (R. Dewsnup & D. Jensen, eds.). Washington, D.C.: Government Printing Office. 1973. Pp. xiii, 826.

The work product of the National Water Commission constitutes the most significant national evaluation of water resources law and policy ever undertaken. Previous national efforts, such as the Joint Senate Select Committee on Water Resources, confined themselves to making extensive but simplistic inventories of existing water resources and demands; future needs were then calculated by simply projecting demand based on assumptions of continued, rapid national economic growth.¹ The Committee report was an uncritical brief for continued federal support of water resources development.² Further, the Committee's study was not truly national because, although it did consider expanding the role of the Army Corps of Engineers in guaranteeing adequate storage facilities in the East, its principal focus was on the development of western water resources.

The National Water Commission, on the other hand, based its studies on the assumption that demand was subject to modification through manipulation of the incentives for the efficient use of water.³ Thus, the Commission not only surveyed existing water resources and uses, but also attempted to define the policies that should guide future use. The Commission proposed substantial changes in federal subsidy programs, in federal water pollution control policy, as well as in more technical doctrines such as federal reserved rights. The Commission properly placed strong emphasis on the role that law does and should play in the allocation of water resources.

One by-product of the Commission's work is *A Summary-Digest of State Water Laws*.⁴ The volume, over eight hundred pages long, contains a general overview of water law principles and separate chapters on the law of each state. It is the first and only modern water law commentary to treat systematically, if generally, both western and eastern systems. Previous commentaries have focused on the West or on the law of one state. The summary is generally descriptive rather than critical, but the Commission's reformist biases, with which I agree, show through occasionally. For ex-

¹ McGuinness, *Water for the United States: An Analysis of the Report of the Senate Select Committee on National Water Resources*, 2 NATURAL RESOURCES J. 187, 195 (1962).

² For a discussion of the report, see Hamilton, *The Senate Select Committee on Water Resources: An Ethical and Rational Criticism*, 2 NATURAL RESOURCES J. 45 (1962).

³ NATIONAL WATER COMMISSION, *WATER POLICIES FOR THE FUTURE* 2 (1973). The Commission's assistant general counsel has said that a theme that runs through the Report is that "[s]ound economic principles should be adopted to encourage a better use of water resources and prevent waste." Meyers, *The Busy Practitioner's Guide to the National Water Commission Report*, 19 ROCKY MT. MIN. L. INST. 513, 515 (1974).

⁴ NATIONAL WATER COMMISSION, *A SUMMARY-DIGEST OF STATE WATER LAWS* (R. Dewsnup and D. Jensen eds. 1973) [hereinafter cited as SUMMARY-DIGEST].

ample, these biases are evident in the discussion of the reserved rights doctrine and, to a lesser extent, in topics such as the Florida Water Resources Act of 1972.⁵

The major contribution of the *Summary-Digest* is its comprehensiveness; its major weakness, if the term is appropriate, is its summary nature. The analysis is primarily a synthesis of existing scholarship; hence the quality of the chapters, especially the summaries of state law, is dependent on the quality of that scholarship.⁶ Not surprisingly, the appropriation state chapters will be the most useful for the practitioner, for they contain not only a generally accurate summary of the important cases and state regulation systems, but also a discussion of problem areas that have been examined by commentators. Within these limitations, the *Summary-Digest* is a very useful starting source for the lawyer or general scholar interested in water law.

The first five chapters present an overview of the common law of prior appropriation and riparian rights, state regulations, surface waters, ground water, the public trust in navigable waters, and reserved rights. These overview chapters contain a concise but insightful blend of history, doctrine, policy, and functional analysis. No other work on water law provides such a concise synthesis of the existing state of the law and puts current problems in the perspective of prior developments. Specialists may find little or nothing new in those chapters but will nonetheless find them interesting reading. Western lawyers will find Chapter Two the most interesting because it contains a general discussion of the principles of state regulation of appropriative rights. The chapter can serve as an authoritative source of many general principles which are elsewhere assumed but often not clearly articulated, such as the duties of a water commissioner.⁷ The discussion in Chapter Two of eastern permit systems and statutory developments properly emphasizes the lack of consistent principles in most eastern water law reform efforts. Chapter Five contains a good discussion of the interrelationships between historic concepts of navigability and the full reach of the commerce power under the Constitution, as well as the foundations of the public trust doctrine. Because both of these topics, which previously have been comparatively unimportant for western water law, provide a basis for state and federal recognition of environmental

⁵ FLA. STAT. ANN. §§ 373.013 to .6161 (1974). The Florida Act substitutes a curious system of administrative distribution in times of shortage, pursuant to broad statutory standards, for the unsatisfactory and uncertain common law, in preference to the "wasteful" system of prior appropriation. The Act is discussed in SUMMARY-DIGEST, *supra* note 4, at 204-25. For an insightful criticism of the Model Water Code provisions for distribution in times of shortage, on which the Florida Act is based, see Trelease, *The Model Water Code, the Wise Administrator and the Goddam Bureaucrat*, 14 NATURAL RESOURCES J. 207 (1974).

⁶ On the whole, the *Summary-Digest* makes good use of existing scholarship, but there are some omissions. For example, the best study of the interplay between the common law and state allocation through reservoir construction in Indiana is not cited. See Waite, *Beneficial Use of Water in a Riparian Jurisdiction*, 1969 Wis. L. Rev. 864.

⁷ SUMMARY-DIGEST, *supra* note 4, at 15-16.

quality values, they are becoming increasingly important in the West as well as elsewhere.

The most significant academic contribution of the *Summary-Digest* is its analysis of modern state water resources legislation, especially in the eastern half of the country. Eastern water law cases are not, on the whole, very useful, because they often deal with minor problems and, more importantly, are generally of little precedential value. The editors of the *Summary-Digest* were very sensitive to this problem, and the chapters on state law in riparian jurisdictions reflect a good sense of the relative importance of legal doctrine and statutory development in the hard allocation choices that are just beginning to be faced in the East, especially with respect to recognition of environmental values. Historically, water has been used for waste assimilation, municipal and industrial supply, and irrigation. While these demands have always competed among themselves, they must now also compete with demands to preserve the stability of natural ecological communities. The common law is not a good mechanism for accommodating these new demands, since the widespread benefits that flow from their recognition are foreign to the calculus of interests historically protected through private rights. Thus, these new interests must be recognized and accommodated by the legislative and administrative processes. This recognition will often be accomplished by the establishment of minimum or optimum flows, pursuant to the state's broad powers over its waters, which will provide the standard against which future impoundments or consumptive withdrawals can be conditioned. It is still too early to predict the impact that state regulation will have on recognition of these interests, but many states have enacted regulating statutes, and the *Summary-Digest* outlines them well. The discussions of legislation in Iowa, Michigan, Wisconsin, and Utah are particularly interesting in this regard. Recent amendments to the Utah Water Code,⁸ for example, permit the state engineer to reject an application to appropriate water if he concludes that it will unreasonably jeopardize the protection of recreational and environmental uses. These amendments potentially allow minimum flows to be fixed by administrative discretion. The operative significance of minimum flow maintenance can be understood only through an examination of the administrative practices in these states, and although the *Summary-Digest* does not discuss state policies, it does refer the reader to the relevant literature.

Statutory recognition of environmental considerations is only the first step in the protection of environmental quality. A further necessary step is the determination of the manner in which newly recognized public rights

⁸ UTAH CODE ANN. §§ 73-3-8, -29 (Supp. 1973); see SUMMARY-DIGEST, *supra* note 4, at 719-20. The most sophisticated integration of environmental and developmental values has occurred in Washington, which permits the Department of Ecology to establish minimum flow and lake levels. WASH. REV. CODE ANN. § 90.22.010 (Supp. 1973). The statutes are summarized in SUMMARY-DIGEST, *supra* note 4, at 777-78. Cf. Application of Hemco, Inc., 283 A.2d 246 (Vt. 1971). The Vermont scheme for protecting environmental values is discussed in SUMMARY-DIGEST, *supra* note 4, at 737-39.

will be integrated with traditional private rights. The general problem of environmental protection is properly beyond the scope of the *Summary-Digest*, although as with all the Commission's work, the problem is addressed in many contexts. Integration of public and private rights is a pervasive issue,⁹ and lawyers must recognize that the range of considerations relevant to the acquisition of a right to use water is expanding. For example, a significant recent Washington decision, *Stempel v. Department of Water Resources*,¹⁰ illustrates that adoption of "little NEPA's"¹¹ will change the ground rules for the perfection of a valid appropriation.

In *Stempel*, an application to appropriate 0.7 cubic feet per second from a lake north of Spokane was challenged by cabin owners on the lake, who argued that numerous pollution problems were imminent if the lake level were further lowered. The State of Washington has long had a statutory procedure to establish minimum lake levels to control flooding and weeds, but in this case, flood or weed control was not an issue and there was no proof that the existing rights of riparian owners would be impaired. The Department of Ecology, successor agency to the Department of Water Resources, therefore concluded that the statutory language which required it to determine whether the proposed appropriation would amount to a "detriment to the public welfare"¹² referred only to the rights of those who might be injured by withdrawal of the water. The Washington Supreme Court disagreed and held that the pollution problems raised by the riparians must be considered and that the Department of Ecology had to file an environmental impact statement because the State Environmental Policy Act of 1971 (SEPA)¹³ obligated the Department "to consider the total environmental and ecological factors to the fullest in deciding major matters."¹⁴ *Stempel* is consistent with the federal precedents which have held that the National Environmental Policy Act of 1971¹⁵ broadens the mandate of existing federal agencies.¹⁶ Several states, including Utah, have long been authorized to define the public interest broadly when applications for major dams have been filed and thus, especially after recent amendments, have been subjecting proposed ap-

⁹ It is significant that the second edition of Professor Frank Trelease's *Water Law*, a leading casebook, is now titled *Water Law: Resource Use and Environmental Protection*. F. TRELEASE, *WATER LAW: RESOURCE USE AND ENVIRONMENTAL PROTECTION* (2d ed. 1974).

¹⁰ 82 Wash. 2d 109, 508 P.2d 166 (1973). See also *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 108 Cal. Rptr. 377 (1973); *Environmental Defense Fund v. Coastside County Water Dist.*, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972).

¹¹ The term refers to state environmental policy acts that are similar to the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (1970).

¹² 508 P.2d at 171.

¹³ WASH. REV. CODE ANN. § 43.21C (Supp. 1973).

¹⁴ 508 P.2d at 171.

¹⁵ 42 U.S.C. §§ 4321 *et seq.* (1970).

¹⁶ See Anderson, *The National Environmental Policy Act*, in ENVIRONMENTAL LAW INSTITUTE, *FEDERAL ENVIRONMENTAL LAW* 238, 286-97 (E. Dolgin & T. Guilbert eds. 1974).

propriations to a public interest evaluation somewhat similar to that required by an environmental impact statement.¹⁷ *Stempel*, however, considerably broadens the range of factors that state administrative officials in those states with little NEPA's must consider in reviewing small-scale diversions. Environmental considerations should, of course, be incorporated into all phases of water resources allocation, and many state administrative reorganizations described in the *Summary-Digest* have this objective. States considering the adoption of little NEPA's should, however, carefully weigh the consequences of subjecting diversion permits to the impact statement requirement against the consequences of other means of recognizing environmental values, such as administrative or legislative qualification of public rights through minimum flows and lake levels, which would give appropriators advance notice that unappropriated water now includes water withdrawn to protect public rights.¹⁸ Environmental impact analysis may introduce considerable uncertainty into the law of water rights without a corresponding gain in the ultimate recognition of environmental values. As the *Stempel* court observed, an environmental impact statement "does not demand any particular substantive result in governmental decision-making."¹⁹

The *Summary-Digest* is in keeping with the high quality of the Commission's work product and represents money well spent by the government. Practitioners and others interested in water law will find this volume a useful starting point for research on both familiar and new water law problems.

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¹⁷ The *Stempel* court also cited the Water Resources Act of 1971, WASH. REV. CODE ANN. § 90.54.020(3)(a) (Supp. 1973), which specifies: "Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served."

¹⁸ Full scale, case by case environmental impact review will still be necessary for large scale projects. See California State Water Resources Control Bd., dec. 1379, July, 1971 (Delta Water Rights Decision), cited in SUMMARY-DIGEST, *supra* note 4, at 137.

¹⁹ 508 P.2d at 172.